76-34

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1975

KERRY M. GOUGH, TRUSTEE IN BANKRUPTCY OF
LOUIS ROSEN, dba WALNUT CREEK FURNITURE,
Petitioner,
vs.
ROSSMOOR CORPORATION and CRESTMARK CARPET
AND DRAPERY CO.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The opinions below are identified in the Petition, and copies of those opinions are appended thereto.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

For reasons which will be stated in a later section of this brief, petitioner's statement of the "Questions Presented" does not accurately portray the questions which are properly before the Court on this Petition. Accordingly, respondents submit the following alternative version of the questions presented:

1. Should this Court entertain a petition for a writ of certiorari to review an interlocutory judgment of a court of appeals which has remanded the case to the district court for initial consideration of pending motions for a new trial and for judgment notwithstanding the verdict?

2. When a court of appeals has reversed the verdict of a jury on special interrogatories and the verdict-winner and appellee has included in his petition for rehearing motions for a new trial and for judgment notwithstanding the jury's adverse answers to certain interrogatories, does the court of appeals abuse its discretion in remanding these motions for initial consideration by the district court?

3. Did the Court of Appeals for the Ninth Circuit properly interpret the opinion of a previous panel of that same court, which had directed the conduct of "further proceedings," when it remanded this action to the district court for initial consideration of pending motions for new trial and judgment n.o.v.?

Statutes Involved

Like his version of the Questions Presented, petitioner's description of the Statutes Involved in this proceeding is inaccurate. Since the merits of the case are not at issue for reasons which will be explained below, the Sherman and Clayton Acts have no bearing on the disposition of this Petition. The statutes which should actually guide the Court's decision on the Petition are Section 2106 of the Judicial Code (28 U.S.C. Section 2106) and Rules 50 and 59 of the Federal Rules of Civil Procedure. Copies of these statutes are attached to this Opposition as Appendix 1.

Statement Of The Case

The Statement of the case submitted by petitioner fails to provide a fair and complete account of the proceedings below and at the same time, unnecessarily includes a great deal of material which is unrelated to the issues

presented by the Petition. Particularly inappropriate is the inclusion of a lengthy recital of the trial testimony relating to petitioner's substantive claims under the antitrust laws. The apparent purpose of including this material is to lay the foundation for an argument on the merits of respondents' motions for a new trial and for judgment n.o.v. which are now pending in the district court. As will be demonstrated below, the merits of these motions are not before this Court at this time, since they have not yet been passed upon by any of the courts below. Respondents will therefore not burden the court with a detailed recital of the various distortions and inaccuracies which appear in petitioner's account of the trial testimony.* Instead, respondents will attempt to remedy the misplaced emphasis in petitioner's statement of the case by setting forth the following facts which actually have a bearing on the disposition of this Petition:

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* Respondents' views on the merits of petitioner's substantive claims and the merits of their pending motions for a new trial and for judgment n.o.v. are set forth in the Memorandum of Points and Authorities which was filed in support of their motion in the district court (R. 517-48).

Petitioner Kerry M. Gough is the trustee in bankruptcy of Louis Rosen, the former owner of a furniture and carpet store in Walnut Creek, California, who commenced this action in the United States District Court for the Northern District of California (R. 1-7). Rosen's complaint originally named four defendants: Rossmoor Corporation, a housing developer and contractor, Crestmark Carpet and Drapery Company, a subsidiary of Rossmoor Corporation, and Leisure World Foundation and Golden Rain Foundation, two non-profit corporations which administered Rossmoor Leisure World, a housing development for senior citizens constructed by Rossmoor Corporation (Id.). The complaint alleged that these defendants had conspired to exclude Rosen's carpet advertising from the Leisure World News, a "house" newspaper distributed free of charge by Leisure World Foundation to the residents of Rossmoor Leisure World (Id.). The claims against Leisure World Foundation and Golden Rain Foundation were dismissed during pre-trial proceedings and these parties were not defendants at the time of the trial (R. 92).

The case was tried to a jury before Judge Elbert Tuttle, sitting by assignment in the Northern District of California. At the close of plaintiff's case, the defendants moved for

a directed verdict in their favor (R. 995-1007). Judge Tuttle denied their motion but made the following remarks in the course of announcing his ruling (R. 1007):

> "THE COURT: Gentlemen, I think that this is a very thin case to go to the jury. It may be a case--of course, I won't tell the jury this--it may be a case which, if a jury verdict is found for the plaintiff and the proper motions are made, might upon careful study of the record, a careful study of it more carefully than I have been able to do in the constant days of trial, might have to be set aside.
>
> Counsel know about this procedure.
>
> I think it proper to submit it to the jury, as I say, even though the testimony from which inferences can be drawn that support a finding of illegal combination in violation of the Sherman Act are, as I say, rather thin."

The case was ultimately submitted to the jury on special interrogatories pursuant to Rule 49 of the Federal Rules of Civil Procedure (R. 226-27). On the basis of the jury's negative answer to Interrogatory No. 3, relating to the question of effect upon interstate commerce, the court entered judgment for the defendants (R. 285-87). Plaintiff's motion for judgment notwithstanding the Jury's verdict on the third interrogatory was denied (R. 287).

On plaintiff's appeal from this initial judgment, the court of appeals reversed the judgment, holding on several alternative grounds that the jury's finding of a lack of impact upon interstate commerce should have been set aside. Gough v. Rossmoor Corp., 487 F.2d 373 (9th Cir. 1973) (Petition, App. B.). Because the jury had answered the other special interrogatories favorably to the plaintiff, the court's original opinion, filed on October 17, 1973, directed the district court simply to enter judgment in the plaintiff's favor (R. 296):

> "In view of the jury's findings with respect to substantive violation and damage, judgment should have been entered for plaintiff. The judgment is reversed, and the cause remanded for this purpose."

Defendants thereupon filed a petition for rehearing in which, among other things, they pointed out that a simple direction to enter judgment in plaintiff's favor was not appropriate, insofar as it would preclude defendants from raising any grounds for new trial or for judgment n.o.v. which they would have been able to raise if a verdict had originally been rendered against them at trial (R. 353-412). In addition to asserting various grounds for reconsideration and for rehearing en banc of the court's decision on the interstate commerce

issue, the petition included separate motions for a new trial and for judgment notwithstanding the verdict (R. 391-411).* These motions were included in the petition pursuant to the procedures prescribed by the Supreme Court in Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967) (R. 364-65). Pursuant to those same procedures, defendants' motions requested that the court of appeals grant the motions or, alternatively, that it remand the case to the district court for hearings on the motions (R. 391, 406, 411).

In response to the petition for rehearing, the court of appeals entered an order modifying its opinion by deleting the direction to enter judgment and by substituting a direction to conduct "further proceedings" in the district court, and otherwise denied the petition (R. 289). The entire text of the court's order is as follows:

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* The petition was divided into four separate parts, having the following titles (R. 357-58):

I - Petition for Rehearing Addressed to the Panel

II - Petition for Rehearing by the Court Sitting En Banc

III - Motion for Judgment Notwithstanding the Verdict

IV - Motion for New Trial

"The last two sentences of the opinion filed October 17, 1973, are stricken, and the following sentence added as a separate paragraph:

> 'The judgment is vacated and the cause remanded for further proceedings consistent with this opinion.'

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected."

Immediately following remand, plaintiff made a "Motion to Enter Judgment in Conformity with Mandate of Ninth Circuit" (R. 297-306). Plaintiff contended in his moving papers that the district court, notwithstanding the court of appeals' direction to conduct "further proceedings," should enter a "final judgment" and should decline to entertain motions by defendants for a new trial or for judgment n.o.v. (R. 303-06). The district court accepted plaintiff's position and filed an opinion holding that the court was precluded from entertaining such motions on their merits because motions for a new trial and for judgment n.o.v. had already been implicitly

denied by the court of appeals in its order entered in response to the petition for rehearing (R. 451-57; App. C to Petition). Accordingly, the court announced that it would decline to hear the motions and, after resolution of the matter of attorneys' fees, entered judgment for plaintiff in the amount of $172,643.00 plus costs (R. 451-57). Within ten days thereafter, for the purpose of protecting their record, defendants observed the formality of serving and filing in the district court their motions for a new trial and for judgment n.o.v., supported by briefs substantially identical to the briefs submitted in support of these motions as part of the petition for rehearing in the court of appeals (R. 517-48). An order denying the motions was entered on December 6, 1975 (R. 559).

Defendants thereupon appealed the judgment. The sole issue presented on this appeal was whether the district court had properly interpreted the earlier mandate in holding that it was precluded from adjudicating the merits of defendants' motions for a new trial and judgment n.o.v. (Opening Brief of Appellants, pp. 1-2). The court of appeals held that the district court had indeed misinterpreted the mandate and accordingly remanded the cause "for the trial judge's consideration of the merits of Rossmoor's motions for judgment n.o.v. and new trial" (App. A to

Petition). Following denial of his petition for rehearing, and before the trial court heard the motions on the merits, plaintiff filed his Petition for a writ of Certiorari in this Court.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I.

THE PETITION SEEKS REVIEW OF AN INTERLOCUTORY ORDER WHICH MAY BE REVIEWED, IF NECESSARY, FOLLOWING FINAL JUDGMENT

A simple examination of the opinion below (App. A to Petition) should be sufficient to apprise the Court that the extraordinary relief of certiorari is not appropriate at this time. The Court of Appeals has remanded this case to the district court for consideration of respondents' motions for new trial and judgment n.o.v. The propriety of that order may be reviewed by this Court, if such review is necessary, following the disposition of those motions. The only harm that petitioner will suffer if such review is deferred is the risk of losing those motions on the merits. This is not the extraordinary threatened injury that justifies review by certiorari of interlocutory decisions.

A. The Courts Below Have Not Ruled On The Merits Of Respondents' Motions For New Trial And Judgment N.O.V. And Those Substantive Matters Are Not Ripe For Review By This Court

Petitioner suggests that the motions for new trial and judgment n.o.v., which the district court is to consider on remand, have already been decided on the merits, and therefore, are ripe for review by this Court. This is an incorrect characterization of the record.

As the opinions of both the district court and the court of appeals make clear (Appendices A and C to the Petition), the sole question which was litigated in the proceedings below was whether the trial court was foreclosed by the results of the first appeal from entertaining respondents' motions on their merits. The court of appeals answered this question in the negative and remanded the case for consideration of the motions by the district court. The filing of the Petition, however, has prevented the district court from actually undertaking consideration of the motions. At this stage, therefore, neither of the courts below has given any consideration to the merits of respondents' motions challenging the sufficiency of the evidence to support the jury's findings on liability and damages. Petitioner's suggestion that this Court should now consider

that issue therefore represents an unwarranted attempt to obtain initial consideration by the highest court in the land of the merits of motions which are specifically required by the Federal Rules of Civil Procedure to be addressed to the trial court and which in fact have never been ruled upon in this case by either of the courts below.

1. The Motions Have Not Been Ruled Upon By The Court Of Appeals

Petitioner argues that the Court of Appeals decided the motions in question in the first appeal of this action, when it remanded the case for further proceedings (Petition, 25-29). This is an argument that was briefed extensively in the second appeal of this action, when the appellate court decided that those motions had not been heard on the merits and remanded with specific directions to consider the motions. The reasoning of the Appellate Court is contained in its opinion, (App. A to Petition) and need not be expanded here.

2. The Trial Court Has Not Ruled Upon The Merits Of Respondents' Motions

Petitioner attempts to buttress his claim that the motions were heard on the merits by suggesting that the district court considered the motions on that basis following the first

appeal (Petition, 31-32). He indicates that the trial judge in this case actually did consider respondents' motions on their merits and denied them on the basis of a determination "from his knowledge of the record and the proceedings that the plaintiff, who had established all factual issues except as to jurisdiction in this court, had a right to judgment" (Petition, p. 3). Petitioner appears to be suggesting that the district court, despite its own announcement that it would decline to do so, specifically entertained and denied respondents' motions on their merits when the motions were formally filed following entry of judgment.

This contention represents not only a surprising about-face for a party who has contended throughout these proceedings that the district court was precluded from considering the merits of respondents' motions, but also a disingenuous attempt to mislead this Court regarding the contents of the record in this case. To demonstrate the validity of this admittedly serious accusation, it will be necessary to review in some detail the record of the proceedings in the district court following the remand from the first appeal of this case.

As noted in the Statement of the Case set forth above, immediately after remand from the

first appeal of this case, petitioner made a "Motion to Enter Judgment in Conformity with Mandate of Ninth Circuit" (R. 298-313). The purpose of that motion was to obtain entry of a "final judgment for plaintiff" which would preclude consideration of the grounds offered by defendants in support of the motions for judgment n.o.v. and for a new trial, which motions had been presented to the court of appeals and remanded for consideration by the district court (R. 298, 304-5). In his supporting papers, petitioner argued, as he argues here, that these motions had already been denied by the court of appeals and were thus foreclosed from further consideration by the district court (R. 304-5, 417-19).

After a briefing by counsel (R. 424-27, 584-93), the court rendered its ruling granting petitioner's motion and announcing that a "final" judgment would be entered in petitioner's favor (R. 451-57). The opinion of the trial court clearly states that this ruling was based on its determination that respondents' motions for new trial and judgment n.o.v. had been denied by the court of appeals, and that consideration of the merits of those motions was therefore foreclosed. (R. 454, 456-57; App. C to Petition, 28-29, 32).

Although this ruling of the court obviously precluded any consideration of respondents' motions on their merits, respondents nevertheless

formally filed their motions within ten days after the entry of judgment, as required by F.R.C.P. Rules 50 and 59. Respondents took this action for the sole purpose of preserving their record and of protecting themselves against a contention that they had waived their right to appeal from the court's refusal to hear their motions by failing to take the formal step of filing the motions (R. 517-49). In their memorandum accompanying the motions, respondents expressly conceded that the court's prior ruling required denial of their motions and that the motions were being filed merely as a formality (R. 524-25).

Petitioner's response to respondents' motions consisted solely of an argument that "[t]his Honorable Court has ruled that the defendants may not now raise their motion for Judgment notwithstanding the verdict or, in the alternative, their motion for a new trial," and that the filing of respondents' motions was "in patent conflict with the Court's decision" (R. 550-51). The district court thereupon denied the motions simply by pen-changing the word "granted" to "denied" in the form of order which had been submitted by defendants with their motions pursuant to Local Rule 114 of the Local Rules of Practice of the Northern District of California (R. 559).

No comment on this record is necessary in order to demonstrate that the district court refused, unequivocally and absolutely, to entertain defendants' motions on their merits. Petitioner's contrary representation is simply incorrect.

B. Petitioner Has Made No Showing Which Would Warrant The Extraordinary Relief Of Certiorari To Review An Interlocutory Order

As noted above, the court of appeals has remanded this case to the district court "for the trial judge's consideration of the merits of Rossmoor's Motions for judgment n.o.v. and new trial" (App. A to Petition). Those motions are now pending in the district court and will be decided by that court when the proceedings on this petition are completed. Depending upon the district court's ruling on the motions, it may be that a re-trial of this action will be required. In any case, it is entirely possible that further proceedings in the district court, and perhaps in this court of appeals will be necessary before this litigation is disposed of by the lower courts. In these circumstances it is quite clear that the judgment sought to be reviewed is not in any sense a "final judgment."

This Court has an established policy against piecemeal review of interlocutory orders of lower federal courts. See e.g. Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Ry. Co., 389 U.S. 327 (1967) (certiorari denied for lack of ripeness where appellate court had remanded for further proceedings). See also American Construction Co. v. Jacksonville T&KW. Ry. Co., 148 U.S. 372, 384 (1893) (review of interlocutroy orders only when necessary to avoid extraordinary inconvenience).

There are, of course, exceptions to this rule, as when extraordinary and irreparable harm will occur in the interim preceding review of a final judgment. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (certiorari granted to review preliminary injunction restraining enforcement of presidential order directing seizure of steel mills on grounds of national emergency). However, petitioner has offered no reason for such extraordinary relief in this instance. Indeed, the only harm that will come to petitioner if his petition is denied is that respondents' motions for new trial and judgment n.o.v. will be heard on the merits. While one can certainly understand petitioner's desire to avoid such a hearing by a trial judge who has already characterized petitioner's proof of

antitrust liability as "very thin, this desire is not a justification for turning topsy-turvy the normal processes of judicial review.

II.

THE QUESTION OF THE POWER OF THE COURT OF APPEALS TO REMAND THE CASE TO THE DISTRICT COURT FOR INITIAL CONSIDERATION OF RESPONDENTS' MOTIONS FOR NEW TRIAL AND JUDGMENT N.O.V. DOES NOT WARRANT REVIEW BY CERTIORARI

The principal issue addressed by the court below was whether that court, by its modified opinion on the first appeal, intended to require the district court to entertain on the merits the motions for a new trial and for judgment n.o.v. which respondents had presented in their petition for rehearing. No question was raised below regarding the power of the court of appeals to require that the motions be considered in that manner, the only question being whether in fact it had done so (see App. A to Petition). In his Petition for Writ of Certiorari, however, petitioner for the first time raises such a challenge to the power of the court of appeals by suggesting somewhat obscurely at various points in his petition that the court may have been legally precluded from directing the district court to entertain respondents' motions (Petition

pp. 2, 4, 21-23). Petitioner's contention in this regard is altogether frivolous. It will here be demonstrated that the power of the court of appeals to do what it did in this case is firmly established by well settled legal principles, and that no serious question is presented by petitioner's vague intimation to the contrary.

A. The Power Of A Court Of Appeals To Remand A Case For Consideration Of Motions For New Trial And Judgment N.O.V. Is Well-Established And There Is No Conflict In The Circuits Which Would Merit The Attention Of This Court

The statutes governing the powers of the appellate courts to dispose of appeals from the district courts in situations of this kind clearly authorize the disposition that was made in this case. Section 2106 of the Judicial Code (28 U.S.C. Section 2106) provides that a court of appeals may in any case "remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances" (emphasis added). Rule 50(d) of the Federal Rules of Civil Procedure similarly provides, with respect to the very type of situation presented here, that "nothing in this rule precludes [the court of appeals] from determining that the appellee [whose judgment is reversed on appeal] is entitled to a new trial, or from

directing the trial court to determine whether a new trial shall be granted" (emphasis added).

As if the statute and the Rule were not enough, it happens that the issue of the power of a court of appeals to remand to the district court for initial consideration of motions for post-judgment relief made for the first time on appeal was discussed by this Court in Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967). In that case, a trial court denied a defendant's motions for new trial and judgment n.o.v. The appellate court reversed for insufficient evidence and instructed the trial court to dismiss the action. This Court affirmed, holding that the appellate court had the power to direct dismissal, and was not obligated to remand for consideration of the motion for new trial.

Although the principal issue decided in Neely was the authority of the court of appeals to decline to remand such matters, the Court simultaneously affirmed in its opinion the appellate court's power to require an initial determination by the district court of all questions affecting an appellee's right to post-judgment relief. Thus the Court stated (386 U.S. at 323-24):

> "Rule 50(d) . . . emphasizes that 'nothing in this rule precludes' the court of appeals 'from determining that the appellee

> is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted. Quite properly, this Rule recognizes that the appellate court may prefer that the trial judge pass first upon the appellee's new trial suggestion. Nevertheless, consideration of the new trial question 'in the first instance' is lodged with the court of appeals."

Indeed, the opinion strongly suggests that in the usual case it is preferable for the court of appeals, notwithstanding its power to do otherwise, to refer such motions for initial consideration by the district court on remand. Thus the Court states (386 U.S. at 325):

> "[The appellee] may have valid grounds for a new trial, some or all of which should be passed upon by the district court, rather than the court of appeals, because of the trial judge's first-hand knowledge of witnesses, testimony, and issues - because of his 'feel' for the overall case. These are very valid concerns to which the court of appeals should be constantly alert."

This suggestion was reinforced in a case decided shortly after Neely, where the Court reversed a court of appeals' denial of a motion for new trial made in a petition for rehearing by a verdict-winner whose verdict had been set aside on appeal. The Court cited Neely and held that "the case should have been remanded to the Trial Judge, who was in the best position to pass

upon the question of a new trial in light of the evidence, his charge to the jury, and the jury's verdict and interrogatory answers." Iacurci v. Lummus Co., 387 U.S. 86, 88 (1967). It would thus appear that the power of the court of appeals to remand for these proceedings is well settled. In this regard it should be noted that petitioner has not directed the Court's attention to any conflict in the circuits on this matter, and respondents are aware of no such conflict.

Lacking any unsettled question to present to this Court, petitioner attempts to manufacture one by suggesting two limitations on the power of appellate courts to remand matters for further consideration, neither of which is stated in the applicable statutes. First, he suggests that the power to remand post-trial motions for consideration by the district court applies "to only those matters which would raise the trial court's first hand knowledge of the witnesses and feel for the overall case," and that all other matters are legally required to be finally determined by the court of appeals itself without remand. (Petition, p. 22). The simple response to this contention is that it is irrelevant. Even the most cursory perusal of respondents' motions will reveal that they raise precisely the types of issues which can best be resolved by a judge who has a "feel for the overall case" (see R. 517-48;

Appendix 2 hereto). A more significant response to this contention, however, is that it is unsupported by any authority. Neither section 2106 of the Judicial Code nor Rule 50 imposes any such qualification on the appellate courts' powers. Nor does the Neely opinion contain anything supportive of such a peculiar limitation. Although both Neely and Iacurci v. Lummus Co., supra, suggest that a court of appeals may have an affirmative obligation to remand to the district court motions by an appellee which present such questions as the credibility of the witness and the weight of the evidence, nothing in either opinion intimates that the court is forbidden to remand motions for post-judgment relief where such factors are not present.

The second limitation which petitioner offers to the power to remand is based on a distinction between motions for new trial and motions for judgment n.o.v. Petitioner notes that Neely involved only a motion for a new trial, whereas this case involves both a motion for a new trial and a motion for judgment n.o.v., and intimates that this might somehow have limited the court of appeals' powers with regard to disposition of respondents' motions (Petition, pp. 23-24). Again, petitioner's suggestion is unsound. While respondents concede that this

case appears to be unique insofar as it involves a motion for judgment notwithstanding the verdict by a party in whose favor the verdict was rendered, this peculiar circumstance does not provide any ground for treating the case as an exception to the principles established by the Neely decision with respect to the verdict-winner's right to seek post-judgment relief following reversal of his verdict on appeal. Since it is clear that the verdict "winner" in this type of situation should have an opportunity at some point following reversal of his verdict to attack the sufficiency of the evidence supporting the adverse findings, and because motions for judgment n.o.v. normally accompany motions for a new trial in all other circumstances, it seems clear that the principles enunciated in Neely to govern the disposition of new-trial motions by a verdict-winner who loses his verdict on appeal should apply equally to motions for judgment notwithstanding the jury's adverse verdict on certain special interrogatories. Petitioner has offered no reason why the powers of the courts of appeals to dispose of such motions should not be co-extensive in both of these types of situations. Respondents submit there are no such reasons.

B. Respondents Motions For New Trial And Judgment N.O.V. Were Timely Made

Petitioner makes a final challenge to the court of appeals' power to dispose of respondent's motions by a remand to the district court by contending that the motions were procedurally defective in that respondents failed to bring the motions before the court in a proper and timely manner. Petitioner argues that respondents "did not comply with Rule 50(b)" of the Federal Rules of Civil Procedure inasmuch as they failed to move for post-judgment relief within ten days after the initial judgment was entered (Petition, pp. 2, 22-23). This argument, like the preceding one, is raised for the first time in the Petition.

Petitioner's argument either misreads the Rule or overlooks the fact that the initial verdict and judgment in this case was in favor of respondents. Rule 50(b) provides only that the losing party in a jury trial may, within ten days after entry of judgment against him, "move to have the verdict and any judgment thereon set aside." Obviously, the party in whose favor the verdict and judgment has been rendered not only need not, but cannot, make a motion to have that very verdict and judgment "set aside." It is only when his verdict and judgment have been

overturned, either by the trial court in post-judgment proceedings under Rules 50 and 59 or by the appellate court, that the occasion first arises for the initially successful party to seek such relief.

Rule 50(c)(2) expressly supports this conclusion, with respect to motions for a new trial. It provides that a verdict-winner who loses his verdict in post-judgment proceedings in the trial court need not make his motion for a new trial until "10 days after entry of the judgment notwithstanding the verdict." The opinion in Neely, supra, similarly interprets Rule 50(d) to allow a verdict-winner who loses his verdict at the appellate level to make his motions for post-judgment relief for the first time following entry of judgment against him in the court of appeals. Thus the Court's opinion states (386 U.S. at 329; emphasis added):

> In our view, . . . Rule 50(d) makes express and adequate provision for the opportunity - which the plaintiff-appellee had without this rule - to present his grounds for a new trial in the event his verdict is set aside by the court of appeals. If he does so in his brief - or in a petition for rehearing if the court of appeals has directed entry of judgment for appellant - the court of appeals may make final disposition of the issues presented, except those which in its informed discretion should be reserved for the trial court."

Respondents recognize, once again, that both Rule 50 and the Neely opinion deal with motions for a new trial and do not expressly consider the unusual case presented here. This, however, is a distinction without a difference. It must be conceded that the duty to move for judgment n.o.v. does not arise until an adverse verdict is rendered. When that adverse verdict is not rendered until the appeal, Rule 50, Neely, and common sense dictate that the right to move for such relief be available at that time. Otherwise parties will be put in the anomalous position of moving to set aside favorable verdicts.

Petitioner's contention that respondents' motions for post-judgment relief were not properly presented to the courts below is thus shown to be entirely without merit. Indeed, as the Statement of the Case indicates, respondents scrupulously complied with all of the procedures prescribed in Neely for bringing these matters to the court's attention. Immediately following reversal of the verdict in their favor, they filed a timely petition for rehearing and rehearing en banc of the court's decision on the interstate-commerce question, which expressly included motions for judgment notwithstanding the verdict and for a new trial (R. 353-412).

When the appellate court failed to decide the subject motions and remanded for further proceedings, respondents renewed their motions and diligently pursued their rights in the district court. The details of respondents' efforts in this regard are adequately set forth in the Statement of the Case.

There can thus be no serious question that the procedures followed by respondents were adequate to bring their motions before the court of appeals and the district court in the manner contemplated by the principles enunciated in Neely, supra. Petitioner's arguments to the contrary are thus exposed as an effort to penalize respondents for not having moved to set aside a verdict rendered in their favor. Respondent's unwillingness to move to set aside a favorable verdict is certainly understandable, and their diligence in moving to set aside the verdict following reversal is clear on the record.

Thus, petitioner's belated and half-hearted attempt to suggest to this Court that the action of the court of appeals was legally improper or that respondents' motions were not properly and timely presented to that court raises no issue which merits serious consideration. To the extent that there ever were any serious questions regarding the courts of appeals' powers or the proper

methods of proceeding in situations of the type presented here, all of those questions were definitively resolved in Neely, supra, and petitioner has shown no reason why any of the principles established in that decision should now be re-examined.

III.

THE QUESTION WHETHER THE COURT OF APPEALS PROPERLY INTERPRETED ITS OWN PRIOR ORDER OF REMAND IS NOT A QUESTION OF GENERAL SIGNIFICANCE AND, IN ANY EVENT, THE RESULT REACHED BY THE COURT OF APPEALS WAS UNQUESTIONABLY CORRECT

The only remaining question is the one that was actually litigated in the court below - namely, whether the court of appeals' modification of its opinion on the first appeal to require "further proceedings" mandated consideration of respondents' motions on the merits by the district court. Unlike most of the issues sought to be raised by petitioner, this is concededly a legitimate issue. At the same time, however, it is hardly an issue of sufficient importance to satisfy the standards which normally govern this Court's discretionary selection of cases from the courts of appeals to be reviewed by writ of certiorari. An interlocutory decision by a court of appeals, interpreting the meaning of the words "further proceedings" as used in the mandate of a prior

panel, is hardly an "important question of federal law" within the ambit of Rule 19 of the Rules of this Court.

Once it is recognized that the Court of Appeals on the first appeal of this case had the authority either to remand respondents' motions to the district court or to decide the motions itself, the only question is which of those options the court in fact chose to exercise. As the parties' briefs and the opinion of the court below reveal, that issue can only be resolved by means of a particularized analysis of the language of the prior opinion and the order modifying the opinion and of the circumstances surrounding the entry of that order (see Appendix A to the Petition; Opening Brief of Appellants, pp. 15-23). While such matters may be of great interest to the litigants and to the court that must decide them, they are obviously of no significance outside the bounds of the particular case. They involve no general legal principles, and they relate to a fact situation which is unlikely ever to be repeated. See, e.g., Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1954) (certiorari dismissed as improvidently granted when subsequent events made case one of isolated significance). In addition, even if the record below is read in the manner most favorable to

petitioner, this case, at best, concerns one panel's doubts about the previous decision of a panel of the same court. As was noted in Wisniewski v. United States, 353 U.S. 901, 902 (1957), where the Court refused to accept certification of a question from the Eighth Circuit, "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." Therefore, this petition does not present the types of questions which should motivate this Court to include this case among the relatively small proportion of cases which it chooses to review by writ of certiorari.

It may also be doubted whether this Court is in a position to improve upon the analysis of these issues undertaken by the court of appeals. In the first place, that court is undoubtedly in a better position to discern the meaning of its own prior mandate than is a reviewing court which possesses far less familiarity with the particular practices of the court which issued the mandate. Secondly, the conclusion reached by the court of appeals on this issue was unquestionably correct.

The court below decided that respondents' motions for new trial and judgment n.o.v. had not been heard on the merits on the first appeal and remanded with a specific direction to hear those motions. The reasoning of that court is stated in its opinion. (App. A to Petition)

Respondents do not wish to burden this Court with a restatement of all of the arguments on the issue which were presented to the court of appeals. However, the most important consideration supporting the court's decision which was not explicitly discussed in its opinion is worth brief mention, inasmuch as it conclusively demonstrates the correctness of the court's decision. That consideration is the simple fact that it is impossible to conceive any plausible explanation of the court's modification of its opinion on the first appeal other than the conclusion that the court was explicitly directing the district court to consider respondents' motions on their merits. The original opinion of the court had simply directed the district court to enter judgment for petitioner (R. 296). In response to respondents' petition for rehearing, the court deleted that direction and substituted a direction to conduct "further proceedings" (R. 289). The only "further proceedings" of any sort which had been mentioned or suggested in respondents' petition were the hearing and decision of respondents' motions for a new trial and for judgment n.o.v. (R. 391-411). If, therefore, the court had not intended that the district court should entertain these motions, there would have been no reason whatsoever for it to have altered its original direction that judgment should be entered for petitioner.

Thus, the only serious issue which is legitimately presented by this Petition for a Writ of Certiorari is of no general significance whatsoever and in any event has been resolved by the court of appeals in a manner which is unquestionably correct. Accordingly, it is submitted that the issue does not merit this Court's attention.

IV.

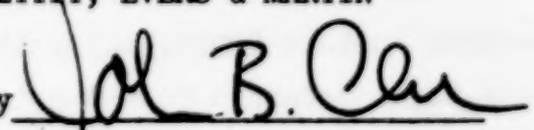
CONCLUSION

Petitioner correctly observes that this litigation is "now in its eleventh year" and pleads that it now "should be terminated." If petitioner is sincere in his desire to terminate the litigation - a desire which is wholeheartedly shared by respondents - he has chosen a singularly inappropriate method of attempting to achieve that objective. The most expeditious way to advance the conclusion of this litigation is not to commence yet another lengthy appellate proceeding in this Court, but rather to allow this case to be returned to the trial judge, who stands ready to exercise his responsibility to adjudicate the legal sufficiency of petitioner's antitrust claims. Many years ago that same trial judge, who heard all of petitioner's evidence, expressed the view that this was "a very thin case to go to the jury" and that the verdict of the jury on liability" might have to be set

aside . . . if a jury verdict is found for the plaintiff and the proper motions are made "(R. 1007). The "proper motions" have now been made and the court of appeals has specifically directed the district court to hear them. Petitioner's attempt to sidetrack the proceedings at this critical juncture by seeking from this Court some sort of advisory pronouncement which would once again delay his day of reckoning should not be countenanced. It has here been demonstrated that most of the issues presented in the Petition for Writ of Certiorari may not appropriately be considered by this Court at this time, and that the remaining issues are of insufficient importance to merit the court's attention. The petition should therefore be denied.

Dated: July 30, 1976

Respectfully submitted,
PETTIT, EVERS & MARTIN

By 

Attorneys for Respondents

APPENDIX

APPENDIX

APPENDIX 1

STATUTES INVOLVED

28 U.S.C. §2106

Section 2106 of the Judicial Code provides as follows:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Rule 50, Fed. R. Civ. P.

Rule 50 of the Federal Rules of Civil Procedure provides as follows:

> "Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict.
>
> (a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for

> directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.
>
> (b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.
>
> (c) Same: Conditional Rulings on Grant of Motion.
>
> (1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any,

by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted."

Rule 59, Fed. R. Civ. P.

Rule 59 of the Federal Rules of Civil Procedure provides as follows:

"Rule 59. New Trials; Amendment of Judgments.

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the

court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion To Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.